2014 WL 550026 (Idaho) (Appellate Brief)
Supreme Court of Idaho.

Gene L. MATTOX, Individually and as Personal Representative
of the Estate of Rosamond Vivian Mattox, Plaintiff-Appellant,
v.
LIFE CARE CENTERS OF AMERICA, INC., d/b/a Life Care of Lewiston, a Tennessee Corporation,
John Does I-V, Jane Does VI-X, and John Doe Corporations XI-XX, Defendant-Respondent.

No. 40762-2013.
January 27, 2014.

Respondent's Brief
Appeal from the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County.
Honorable Carl Kerrick, District Judge, Presiding

Respondent's Brief - Life Care Centers of America, Inc., d/b/a Life Care of Lewiston, a Tennessee Corporation,

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***1 I. Statement of the Case**

A. Nature of Case.

This case involves the prior treatment of Rosamond Mattox (hereinafter “Decedent”) by Life Care Centers of America, Inc. (hereinafter “Life Care”) in Lewiston, Idaho. This appeal arises out of the district court's dismissal of Appellant's (hereafter “Mattox”) wrongful death case following summary judgment proceedings. Mattox alleged in the underlying case, both individually and representing the estate of Rosamond Mattox, that Life Care negligently breached the applicable standard

of care, thereby causing the Decedent's death. This brief is filed in response to Mattox's appeal from the district court's Memorandum Opinion and Order striking Mattox's expert affidavits for lack of foundation under Idaho Code §§ 6-1012 and 1013, and IRCP 56(e), and granting Life Care's Motion for Summary Judgment.

B. Relevant Course of Proceedings.

The procedural history in this case is important as the district court gave Mattox more than ample time to supplement opinions and give his experts' affidavits. Life Care first filed a Motion for Summary Judgment on May 21, 2012, supported by the Affidavit of Carol McIver. R. Vol. I, pp. 24-46. On June 8, 2012, Mattox filed the Affidavits of Wendy Thomason (R. Vol. I., pp. 77-125) and Jayme Mackay, M.D. (R. Vol. I, pp. 123-125), and also moved to enlarge the time for responding to the Motion for Summary Judgment. R. Vol. I., pp. 129-127. Whereupon, Life Care filed a Motion to Strike, among other things, the Affidavit of Wendy Thomason and Jayme Mackay, M.D. R. Vol. I, pp. 136-137.

***2** After the hearing on June 19, 2012, the district court extended the time for disclosing expert opinions several months and reset the summary judgment hearing for November 13, 2012. R. Vol. I, p. 189. After the time for expert disclosures, and more than enough time to qualify expert testimony for two experts, Life Care renewed its motions to strike and for summary judgment on October 15, 2012. R. Vol. II, pp. 301-401. That motion was to strike the affidavits of Nurse Wendy C. Thomason and Jayme Mackay, M.D, filed by Plaintiff on June 8, 2012. R. Vol. II, pp. 301-401. Mattox filed a Second Affidavit and Second Amended Affidavit for Wendy C. Thomason and a Supplemental Affidavit for Jayme Mackay, M.D., and a response to both of Life Care's Motions. R. Vol. II, pp. 402-413; R. Vol. Ill, pp. 414-562. In his response, Mattox argued that the Affidavit of Carol McIver, Life Care's expert, while admissible, was vague and conclusory and therefore "ineffective." R. Vol. III, p. 410. Mattox asserted, in the response, that by presenting two experts' affidavits against Life Care's affidavit and other pleadings, summary judgment was appropriate in favor of Mattox. R. Vol. III, pp. 410-11.

In her affidavit, Nurse Thomason opined that her opinions related to the Lewiston region in the state of Idaho for 2008. R. Vol. Ill, pp. 507-08. Additionally, Nurse Thomason further opined that, in general, local standards of care for a long-term care facility such as Life Care were similar to national standards, thereby omitting testimony as to what those standards were, and failing to provide an explanation as to how such standards may differ from the applicable local standard of care for long-term care facilities such as Life Care in October of 2008. R. Vol. Ill, p. 496. Nurse Thomason did not point to any specific provision statute or regulation allegedly replacing a local standard. Finally, Nurse Thomason averred that she had gained actual ***3** knowledge of the local standard of care in Lewiston, for October of 2008, by consulting four professionals. R. Vol. Ill, pp. 495-96. Significantly, none of the professionals worked as a nurse in a long-term skilled nursing care facility in Lewiston, Idaho in October of 2008; nor otherwise showed that they had actual knowledge of the local standard of a skilled nursing facility in October of 2008 for Lewiston. Id.

Dr. Mackay opined that Decedent died as a result of Life Care failing to provide and use cautions which had been ordered either by him or the Care Plan. R. Vol. Ill, p. 484. Dr. Mackay neither worked at Life Care, nor at any long-term care facility in Lewiston during 2008. Nowhere in his affidavit, or in this record, did Dr. Mackay testify to any facts demonstrating any actual knowledge of the local standard of health care for nurses working in a long-term care facility in Lewiston during 2008. Nonetheless, Dr. Mackay concluded that the failure to use those cautions was a breach of Life Care's standard of care. Id.

In answer to these new affidavits, and Plaintiff's Responses to Defendant's Supplemental Motion for Summary Judgment, Life Care filed a reply arguing that the Second Affidavit of Wendy C. Thomason and the Supplemental Affidavit of Jayme Mackay, M.D. should be stricken because they both failed to meet the foundational requirements of Idaho Code §§ 6-1012 and 1013, in addition to IRCP 56(e). R. Vol. Ill, pp. 563-78. [1] Specifically, Life Care asserted that Nurse Thomason's affidavit was insufficient to support her actual knowledge of the local standard of care practice for a nurse in Lewiston practicing at a long-term care skilled ***4** nursing facility, in 2008. R. Vol. Ill, p. 567. Furthermore, Life Care argued that Dr. Mackay's affidavit was too conclusory and speculative. Life Care also argued that Dr. Mackay did not lay the necessary foundation for the opinion that any breach of the applicable standard of care proximately caused Decedent's death. Id.

After the several-month extension granted Mattox to repair the foundational deficiencies for both experts and the motions filed by Life Care, the district court held a hearing on all the motions and, after careful consideration, struck both Nurse Thomason's and Dr. Mackay's affidavits, and granted summary judgment to Life Care. R. Vol. III, p. 601.

C. Concise Statement of Facts.

Life Care is a skilled nursing facility that provides sub-acute skilled nursing long-term care and both long-term and short-term rehabilitation. As such, Life Care provides individualized treatment plans and a continuity of care to its residents. R. Vol. III, pp. 448-61. Decedent was a resident at Life Care off and on from 2003 up until October 31, 2008, which was the day she was transferred to Tri-State Memorial Hospital. R. Vol. II, pp. 347, 385. For many years the Decedent suffered from severe and progressive dementia, hypertension, hyperthyroidism, and a seizure disorder. R. Vol. II, pp. 355, 357, 359, 365, 380; R. Vol. III, pp. 453-56. The dementia and seizure disorders were essentially secondary to previous frontal lobe resections of her brain and a preexisting depressive disorder. R. Vol. II, pp. 353, 369, 380; R. Vol. III, pp. 453-56. These two particular disorders caused Decedent to be mentally and emotionally volatile. R. Vol. III, pp. 453-56. This mental and emotional volatility caused the Decedent to change from a state of calm and cooperative to suddenly a state where she was ***5** agitated and/or violent for no apparent reason. *Id.* Her conduct, moods, and attitude were unpredictable and when she was calm she was very pleasant, smiling and happy. *Id.;* R. Vol. II, p380.

Due to the volatility and unpredictability of the Decedent's mental status, the nursing staff at Life Care used extraordinary measures to help protect her. R. Vol. III, pp 448-61. On most days, Decedent would be in a wheelchair next to the nurses' station, where she would either visit with the nurses, sit near and next to the nurses or would be set up at the nurses station while she would color in coloring books. R. Vol. I, p. 88; R. Vol. III, p. 456. These measures allowed the nurses to keep the Decedent under direct observation. *Id.* The nurses would often take Decedent around Life Care with them while they were conducting other tasks. *Id.* Further, because she preferred, Decedent often ate her meals at the nurses' desk. *Id.* Decedent was rarely, out of the direct watchful eye of at least one of the center's staff. R. Vol. III, pp 448-61.

Because of Decedent's severe and volatile medical conditions and due to her advanced age, Life Care took additional safety precautions. Decedent's bed was lowered only a few inches off the floor. R. Vol. III, p. 459. Life Care had also placed a padded mat, designed to absorb impacts in case of a fall, on the floor next to the bed. Id. The bed was equipped with partial bedrails at the head of the bed to assist the Decedent to move in bed, to help her sit up, and to prevent her head from rolling off the bed. R. Vol. III, p. 458. Further, Decedent's bed and wheel chair were equipped with a movement alarm. R. Vol. I, p. 459.

In the afternoon of October 31, 2008, Decedent was taking a nap and the movement alarm on her bed mattress sounded and a CNA went directly to her room. R. Vol. I, p. 98. When ***6** the CNA entered the room, she observed that the Decedent had gotten herself out of bed, was lying on the floor with her right leg underneath her, and her left leg extended in front of her. Id. She was later diagnosed at Tri-State Memorial Hospital with a fractured pelvis and femur. R. Vol. I, p. 102; R. Vol. II, p. 390. After being transferred to the Tri State Memorial Hospital for evaluation, the Decedent died the next day. R. Vol. I, pp. 102-04; R. Vol. II, p. 388-90.

Life Care provided the district court with the following pertinent facts:

- Mattox was his mother's Power of Attorney. R. Vol. II, p. 326.

- Mattox over the period of several years, including 2008, continually signed Do Not Resuscitate orders on behalf of Decedent. R. Vol. II, pp. 328-29, 346.

● A “fall release” was signed by Mattox on behalf of Decedent, because of the Decedent's previous history with falls prior to her admittance at Life Care's facility and ongoing propensity to continue to have falls. R. Vol. II, pp. 331-335.

● Decedent was admitted to Life Care for terminal, end-of-life compassionate comfort care. R. Vol. II, pp. 336, 356.

● The Decedent's doctor ordered a number of medications to treat her anxiety and other medical problems, all of which caused balance problems and increased propensity to fall, which effect was increased when these drugs were given in combination. R. Vol. II, pp. 361-379.

● Mattox continuously interfered with lowering the mediation levels, multiple times, demanding the use of additional medication, or higher doses, against nurses and pharmacist recommendations to discontinue or lower dosage. Mattox's demands to give ***7** his mother more medication, and to give it more often, substantially contributed to Decedent's fall. R. Vol. II, pp. 367-379.

● Decedent had constantly been suffering from pneumonia during the later stages of her life, which was due to her propensity to aspirate. Her death was caused by aspiration pneumonia which was a pre-existing diagnosis. R. Vol. II, p. 347; see also R. Vol. I, p. 101, 104.

● Decedent had a history of falls when she previously lived at home with Mattox, and therefore, Mattox was fully aware of this problem. R. Vol. II, p. 393.

● Life Care recommended that Decedent wear “hipsters” for her personal protection. These are specially designed undergarments with padding on the hips intended to protect the hips and femurs of the wearer in the event of a fall. Mattox specifically declined their use and requested that they not be placed on his mother. R. Vol. II, p. 391.

● Mattox elected to forego surgery on Decedent's fracture of October 31, 2008. The children of Decedent, instead, instructed the physician at the hospital to provide her with morphine, which in and of itself causes aspiration in someone of Decedent's medical status and decreases respiratory effort, which effects caused Decedent to decrease her respiratory effort, which led to her death. R. Vol. I, pp. 101, 104; R. Vol. Ill, pp. 384-390.

***8 II. Additional Issues on Appeal & Attorney's fees on appeal**

1. Whether a moving party is required to submit an affidavit or other affirmative evidence in filing for summary judgment, where the nonmoving party carries the burden of proof for that element at trial.

2. Whether Life Care is entitled to attorney's fees and costs pursuant to Idaho Code 12-121, and Idaho Appellate Rules 40 and 41.

III. ARGUMENT

A. Standard of Review.

The striking of expert testimony offered in connection with summary judgment proceedings is reviewed under an **abuse** of discretion standard. *Hall v. Rocky Mountain Emergency Physicians, LLC,* 155 Idaho 322, 325-26, 312 P.3d 313, 316-17 (Idaho 2013), reh‘g denied (Nov. 19, 2013). Notably, the liberal construction and reasonable inference standards typically associated with summary judgment proceedings do not apply in determining the admissibility of expert testimony. *Id.* The review under an **abuse** of discretion standard requires a three-part inquiry: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Suhadolnik v. Pressman,*

151 Idaho 110, 114, 254 P.3d 11, 15 (2011). The reviewing court will not disturb a district court's evidentiary ruling unless there is a clear **abuse** of discretion. *Id.*

***9 B. Life Care Complied with the Applicable Summary Judgment Standards and Burden of Proof.**

Life Care filed a sufficient affidavit with its summary judgment filing, even though it may not have been required to do so. A review of Idaho case law shows it is unclear whether a moving party is required to submit evidence in connection with a motion for summary judgment where the nonmoving party carries the burden of proof at trial. The applicable procedure rule, a line of cases by the Idaho Court of Appeals, and this Court's holding in *Chandler v. Hayden*, 147 Idaho 765, 215 P.3d 485 (2009), suggest no requirement in Rule 56 that the moving party support its motion with affidavits or other evidence negating the opponent's claim. In contrast, other Idaho appellate decisions suggest the movant must present some "evidence" establishing the absence of a genuine issue of fact, thereby shifting the burden to the nonmoving party. *See e.g., Foster v. Traul*, 141 Idaho 890, 120 P.3d 278 (2005). Under either line of cases, however, Life Care has sufficiently shifted the burden of proof at summary judgment to Mattox. [2]

i. Line of Cases Relying on Celotex

Rule 56(b) provides the rule for a defending party to bring a motion for summary judgment. The rule states in pertinent part:

> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, **move with or without supporting affidavits** for a summary judgment in that party's favor as to all or any part thereof. Provided, a motion for summary judgment must be filed at least 60 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court.

***10** I.R.C.P. 56(b) (Emphasis added).

This rule states that a defendant may move "with or without supporting affidavits" for summary judgment. In other words, defendants may allege the "absence of a genuine issue of material fact" without submitting affidavits, and thereby the moving party's burden may be satisfied by showing an absence to any essential element of the plaintiffs claim. *Bromley v. Garey*, 132 Idaho 807, 810, 979 P.2d 1165, 1168 (1999) (citing *Celotex*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986)). In such circumstances, the "absence of a genuine issue of fact with regard to an essential element of plaintiffs claim renders any other potential issues of fact irrelevant." *Id.* Once the absence of evidence on an element has been shown, the burden shifts to the plaintiff to establish a genuine issue of material fact. *Id.* The plaintiff cannot merely "rely upon its pleadings, but must produce affidavits, depositions, or other evidence establishing an issue of material fact." Id. (citing *R.G. Nelson, AIA v. Steer*, 118 Idaho 49, 410, 797 P. 2d 117, 118 (1990)).

This Court's holding in *Chandler* also suggests that no affidavit or affirmative proof is required by the nonmoving party to shift the burden in summary judgment proceeding. Instead, the moving party may show an absence of evidence regarding the nonmoving party's case.

In *Chandler*, the Idaho Supreme Court discussed the holding by the U.S. Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), and recognized "where the nonmoving party bears the burden of proof on the issue at trial, the moving party is not required to negate the nonmoving party's claim." *Chandler*, 147 Idaho at 771, 215 P.3d at 492. In doing so, the Idaho ***11** Supreme Court further recognized that the "language and reasoning of *Celetex* has been adopted by the appellate courts of Idaho." *Id.* at n.2 (citations omitted). Several holdings from the Idaho Court of Appeals similarly indicate that affirmative proof is not required. Rather, an absence of evidence may be shown "by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Antim v. Fred Meyer Stores, Inc.*, 150 *Idaho* 774, 776, 251 P.3d 602,

604 (Idaho App. 2011); *Peterson v. Shore*, 146 Idaho 476, 478, 197 P.3d 789, 791 (Idaho App. 2008); *Dunniock v.* ***Elder***, 126 Idaho 308, 311, 882 P.2d 475, 478 n.1 (Idaho App. 1994).

This approach appears consistent with Rule 56(b), in that summary judgment against a claim may be sought "with or without" supporting affidavits. I.R.C.P. 56(b). As a result, Life Care was not required under these holdings to submit affidavits or other evidence to negate Mattox's claim.

After several months, during which Mattox was granted additional time to correct deficiencies in the Affidavits of Ms. Nurse Thomason and Dr. Mackay, Life Care renewed its motion for summary judgment on the grounds that Mattox had not come forth with any admissible evidence establishing a material issue of fact. R. Vol. II, p 305. While Life Care did support its motion with Carol McIver's affidavit, Life Care could have proceeded solely by reviewing the complete lack of admissible evidence submitted by Mattox with respect to the applicable standard of health care practice. Once the lack of evidence was established, the burden shifted to Mattox to establish a genuine issue of material fact.

***12 ii. Cases Requiring Some "Evidence" to Shift the Burden**

Other Idaho appellate holdings suggest that a nonmoving party must present some "evidence" to establish a genuine issue of fact, thereby shifting the burden to the nonmoving party. *See e.g.*, *Foster*, 141 Idaho at 893, 120 P.3d at 281.

The moving party, electing to proceed with affidavit(s), only needs to present admissible evidence negating the existence of an element on which the plaintiff has the burden to establish. *Id.* This burden is fundamentally different from the nonmoving party, who must set forth *specific facts* demonstrating the existence of an essential element of the case on which it carries the burden. *Id.*

Under these holdings, the moving party only needs to set forth admissible evidence negating the existence of a breach of the applicable standard of care for the class of health care provider to shift the burden of proof to the nonoving party. Id. at 893, 120 P.3d at 103; see also Suhadolnik, 151 Idaho at 116, 254 P.3d at17 n.4 (noting that the defendant met its initial summary judgment burden by testifying he was familiar with the local standard of care and did not breach it) and Hall, 155 Idaho at 325, 312 P.3d at 316 (the affidavit by the defendant stating the conduct met the local standard of care was held sufficient to shift the burden to plaintiff). In response, the nonmoving party carries the burden to establish the essential elements of its case, and must set forth specific facts, by qualified, admissible expert opinion, showing that there was a genuine issue as to whether the applicable standard of health care practice was breached. ***13** Dulaney v. St. Alphonsus Regional Medical Center, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002)(emphasis added). Summary judgment is appropriate if the nonmoving party fails to meet this burden. Id.

The arguments made in Foster are highly analogous to the case at bar. In Foster, the plaintiff contended that the defendant in moving for summary judgment should have presented supporting affidavits setting forth "specific facts." 141 Idaho at 892-93, 120 P.3d at 280-81. As such, the plaintiff argued the burden did not shift as such specific facts were not shown by the moving party. Id. at 893, 120 P.3d at 281. Specifically, the plaintiff argued that the affidavits submitted by the defendant were "fact-deficient" and conclusory, as they asserted compliance with the applicable standard of care without setting forth specific standards or how it was followed. Id.

The Idaho Supreme Court rejected the plaintiff's arguments, holding that although a party moving for summary judgment should "present evidence," it is not required to "present specific facts." Id. at 893, 120 P.3d at 281. In doing so, the Court recognized:

> As a result, the **summary judgment process imposes different requirements on a movant than those faced by the adverse party.** Although the moving for summary judgment must establish through evidence the absence of any genuine issue of material fact, there is no requirement the movant present specific facts. *See Smith*, 128 Idaho at 719,918 P.2d at 588. Once the movant has made and appropriately supported its motion, it is the responsibility of the adverse party to come forward with evidence, id., and to set forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e).

Id. (emphasis added).

***14** While concise, the affidavit of Ms. Carol McIver was sufficient to shift the burden of proof to Mattox. In her affidavit, Ms. McIver testified that she was employed as the director of nursing services at Life Care at the time of treatment in 2008. R. Vol. I, p. 41 Being employed by Life Care she was familiar with, and had an actual knowledge of, the applicable standard of health care practice for facilities such as Life Care. Id. She also testified that she was familiar with, and had an actual knowledge of, the care provided by Life Care to the Decedent. Id. Having firsthand knowledge of this treatment, Ms. McIver was qualified to testify that Life Care did not breach the applicable standard of health care practice for a long-term skilled nursing care facility.

Thus, Ms. McIver's affidavit is sufficient to shift the burden under the holding in Foster. It should be noted that the affidavits at issue in the cases of Suhadolnik and Hall were similarly succinct in stating that the defendants actually knew, and did not breach, the applicable standard of care. As such, this Court has upheld the use of such affidavits by defendants in medical cases. Once Life Care met its burden through Ms. McIver's affidavit, the burden of setting forth specific facts raising a genuine issue of fact properly shifted to Mattox. As discussed infra, the district court properly struck both Dr. Mackay's and Nurse Thomason's affidavits, and summary judgment was appropriately granted. Accordingly, Life Care complied with the summary judgment standards, and the affidavit of Ms. McIver was sufficient to shift the burden, regardless of whether it was required.

***15 C. Standards for Admissibility and Striking Affidavit of Medical Experts Under I.C. §§ 6-1012, 6-1013, and I.R.C.P. 56(e).**

In order to withstand a motion for summary judgment in a medical malpractice case such as this, a plaintiff must establish, through competent, admissible expert medical testimony, that "there has been a *negligent failure* to meet the applicable standard of health care practice in the community." *Anderson v. Hollingsworth,* 136 Idaho 800, 803, 41 P.3d 228, 231 (2001) (Citing Idaho Code § 6-1012)(Emphasis Added). The Idaho legislature has codified the elements that a plaintiff must meet in order to prove a case of medical malpractice. Life Care is a skilled nursing facility providing long-term care and rehabilitation (nursing home), and as such, Idaho Code §§ 6-1012 and 6-1013 apply to a claim for medical malpractice. Specifically, Idaho Code § 6-1012 requires, as an essential element of a plaintiff's case, that he affirmatively prove the following:

> "In any... action for damages due to injury to... any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any... **hospital or nursing home.** on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto,... plaintiff must, ***as an essential part of his or her case in chief,*** affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there **negligently failed to meet the applicable standard of health care practice of the community** in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning."

Id. (2006) (Emphasis added).

***16** "Community" is further defined in that Code section as "that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided." *Id.* In this matter, the local standard of health care practice is judged by the geographical location of Lewiston, Idaho, which is ordinarily served by St. Joseph's Memorial Hospital.

The foregoing requirements must also be read in conjunction with Idaho Code § 6-1013, which provides the means through which a party must prove the essential elements of the medical malpractice claim. § 6-1013 ***requires*** the following:

> The applicable standard of practice and such a defendant's failure to meet said standard ***must be established*** in such a case by such a plaintiff ***by testimony of one*** (1) or more knowledgeable, ***competent expert witnesses,*** and such expert testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that such an opinion is ***actually held by the expert witness,*** (b) that the said opinion can be testified to with ***reasonable medical certainty,*** and (c) that such expert witness possesses ***professional knowledge and expertise*** coupled with the actual knowledge of the applicable said community standard to which his or her expert testimony is addressed...

Idaho Code § 6-1013 (emphasis added). *See also Dulaney,* 137 Idaho at 163. Furthermore, I.R.C.P. 56(e) requires that:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Under these statutes and rules, an opposing expert, as a prerequisite to admitting his or her opinion, must set forth specific facts demonstrating familiarity with the applicable standard ***17** of health care practice for the particular class of health care provider, during the relevant time, and explain how that familiarity was obtained. *Suhadolnik,* 151 Idaho at 116, 254 P.3d at 17; *Dulaney,* 137 Idaho at 164, 45 P.3d at 820. Significantly, this same burden applies to laying adequate foundation for any health care professional who allegedly consulted with the testifying expert. *See Dulaney,* 137 Idaho at 166, 45 P.3d at 822. Setting forth specific facts demonstrating that an expert from a different locale, or class of health care profession or specialty, has the requisite knowledge is critical to surviving a motion for summary judgment. *Id.*

A review of Idaho case law sets forth methods by which an out-of-area expert can gain actual knowledge of the applicable standard of health care for a particular class of health care provider. *Grover v. Smith,* 137 Idaho 247, at 250-51, 1108-09. Actual knowledge can be obtained by consulting a local provider or specialist about the local standard of health care for the specific health care profession, or, at least reviewing depositions from local providers stating that the local standard of health care practice for the class of health care provider does not vary from the national standard, coupled with testimony of familiarity with that standard. *Id.*

In addition, this Court has held that certain regulations have set standards of care applicable to nursing homes in the administration of pharmaceuticals. *Hayward v. Jack's Pharm. Inc.,* 141 Idaho 622, 628-29, 115 P.3d 713, 719-20 (Idaho 2005) (holding that the "start low, go slow" was a minimum standard for administration of phaaceuticals in nursing homes). However, Hayward does not stand for the proposition that every federal or state regulatory scheme supplants a local standard of care. *See McDaniel v. Inland N. W. Renal Care Group-* ***18** *Idaho, LLC,* 144 Idaho 219, 223 159 P.3d 856, 860 (Idaho 2007). Only when an out-of-area expert can point to a specific provision, setting a minimum standard of care necessary for licensure, are the principles of Hayward applicable. *Id.;* Hayward, 141 Idaho at 628, 115 P.3d at 719 (hence the rule that in cases where state or federal laws or regulations set forth minimum requirements for licensure of health care providers local communities are not free to adopt lower standards)(emphasis added); Grover, 137 Idaho at 252, 46 P.3d at 1110 (taking a patient's medical history is a minimum requirement that must be met to become a licensed dentist in Idaho). Absent a clear standard of care, set forth in a specific provision of state or federal law, an out-of-area expert must rely on a health care provider with actual knowledge of the local standard of health care practice applicable to the defendant's class of health care provider to equate it with a state or national standard. *Suhadolnik,* 151 Idaho at 116-17, 254 P.3d 17-18.

When an out-of-area expert familiarizes himself or herself with the local standard of care for a class of health care provider by consulting an out-of-area specialist in the same field, or when they consult a local specialist in a different field, the affidavit

must set out specific facts that aptly demonstrate the consulted professional's familiarity with the local standard of health care practice, during the applicable time period in question, and for the defendant's class of health care provider. *Suhadolnik*, 151 Idaho at 116, 254 P.3d at 17. While this Court has also held that it is not an **abuse** of discretion to admit testimony by a local physician in a certain medical specialty, about other fields of practice, the affidavit *must* also set forth specific facts about the contacts with the defendant's field and how those contacts provide the requisite knowledge of the local standards of care for that class of health care provider. *Newberry v. Martens*, 142 Idaho 284, 292, 127 P.3d 187, 195 (2005) (holding district court did not **abuse** ***19** discretion by admitting expert opinion and testimony that he acquired actual knowledge of standard of care after practicing alongside, trading referrals, and discussing patient care in the defendant's field).

In *Dulaney*, this Court discussed in detail the requirements to lay adequate foundation for the admissibility of expert testimony under Idaho Code § 6-1013. In that case, the malpractice action was brought against an emergency room physician who practiced in Boise. The plaintiffs expert was not a Boise emergency room physician, and attempted to become familiar with the local standard of care for emergency room physicians during the relevant time period. He consulted with a Boise physician who practiced internal medicine at the Boise V.A. hospital. However, this Court held that the expert's affidavit did not meet the foundational requirements for expert testimony in a medical malpractice case because the affidavit did not show that the consulting physician was familiar with the local standard of care for an emergency room physician. The local physician was board-certified to practice emergency medicine, but there was no showing in the affidavit that he had ever worked in an emergency room in Boise, let alone during the relevant time period. This Court noted:

> It may certainly be possible that while practicing internal medicine in Boise, [the consulting physician] became familiar with the local standard of care for emergency room physicians. There are no facts in the record so showing, however. Likewise, it may be that with respect to the care at issue in this case, the local standard for a physician practicing internal medicine is the same as that for a physician practicing emergency room medicine. Again, however, there are no facts in the record so showing.

Dulaney, 137 Idaho 166-67, 45 P.3d at 822-823; see also Hall, 155 Idaho at 327, 312 p.3d at 318.

***20** In Dulaney, this Court also upheld that district court's ruling that an out-of-state professor, who stated that he trained orthopedic physicians practicing in Boise, was insufficient to lay foundation that he had knowledge of the applicable standard of health care practice. *Dulaney*, 137 Idaho at 169, 45 P.3d at 825. In so holding, this Court noted:

> The professor stated that he had trained orthopedic physicians that presently practice in Boise, but he did not state whether they were practicing in Boise in 1994. He stated that he has maintained personal and professional relationships with physicians in Boise, but he did not state whether he did so during 1994. He likewise did not state that he had ever discussed with these orthopedic physicians the standard of care for an orthopedic physician practicing in Boise in 1994. He stated that he had taught and lectured in Boise, but did not state when he did so. Dr. Stump's affidavit does not allege any specific facts showing that the anonymous professor was familiar with the standard of care for orthopedic surgeons in Boise in August 1994. The professor's conclusory statement that he was familiar with the standard of care in Boise in 1994 is simply not sufficient.

Id. This Court has made it very clear that conclusory statements, by the nonmoving party, alleging familiarity with the applicable standard of health care practice, for the relevant time and class of health care provider, without setting forth sufficient, specific facts so supporting, fails to lay the required foundation to admit such testimony. *Id.*

The Idaho Supreme Court's decision in Arregui v. Gallegos-Main is also instructive in this matter, as the familiarizing expert allegedly practiced in the same practice area as the defendant during the relevant time and place. 153 Idaho 801, 291 P.3d 1000 (2012). The Idaho Supreme Court affirmed the district court's ruling. The Court stated:

The Patient did not lay an adequate foundation to show that Dr. Tamai had actual knowledge of the applicable standard of care for ***21** chiropractors in the Nampa-Caldwell area. In her affidavit, Dr. Tamai explained that she familiarized herself with the applicable standard of care by stating:

I have educated myself regarding the local standards of care prevailing in the Nampa-Caldwell area of Idaho, as they existed in June 2007. In addition to my education and experience, **I have spoken with a local chiropractor, who maintained a chiropractic practice, in Caldwell, Idaho, in June 2007, the time period relevant to this litigation, as it was the time period, when Defendant chiropractically [sic] treated Plaintiff, Martha Arregui.** It is my understanding that this chiropractor was appropriately licensed in Idaho as a chiropractor and maintained an active practice of chiropractic medicine during the relevant period. This chiropractor indicated to me that he was familiar with the local standards of care for performing chiropractic procedures in the Nampa and Caldwell communities by licensed chiropractors at the time that the chiropractic care at issue in this case was rendered to the patient. This physician further confirmed to me that the local standards of care at that time were, in all respects, consistent with and, in fact, identical to the standards of care upon which my opinions in this case have been based, namely, the standards of care in Oceanside, California in June 2007.

An expert testifying about the applicable standard of care in medical malpractice cases 'must show that he or she is familiar with the standard of care for the particular health care professional for the relevant community and time. The expert must also state how he or she became familiar with that standard of care.' Dulaney, 137 Idaho at 164, 45 P.3d at 820 (internal citations omitted). In Dr. Tamai's affidavit, she never identified the local chiropractor, **she did not describe the type of chiropractic practice he ran, nor how he became aware of the local standard of care, how long he practiced in the Nampa-Caldwell area, or whether he was familiar with torticollis and the specific procedures allegedly used on the Patient.** It is not enough to show that an out of state medical expert is a member of the same specialty as the defendant physician. Rather, in a medical malpractice case, it must be shown that the expert possesses sufficient knowledge of the specific procedures used by the defendant physician as the alleged malpractice. See ***22** Suhadolnik v. Pressman, 151 Idaho 110, 115-16, 254 P.3d 11, 16-17 (2011). Here, the Patient merely asked the district court to believe Dr. Tama's conclusory statements that the local unidentified chiropractor was familiar with the standard of care and because Dr. Tamai spoke with him, she was also now familiar with the local standard of care. Such meager information is insufficient.

Arregui v. Gallegos-Main, 153 Idaho at 809, 291 P.3d at 1008 (emphasis added). Thus, a familiarizing expert must be shown to have actual knowledge of the applicable standard of health care practice before he or she can convey that knowledge to an out-of-area expert. *See id.*

D. The District Court Acted within its Discretion in Determining the Affidavits of Wendy C. Thomason were Inadmissible.

In this case, the district court acted within its discretion in determining that the affidavits of Wendy Thomason were inadmissible. The district court recognized that Ms. Thomason's Amended Second Affidavit listed four professionals, allegedly interviewed by Ms. Thomason. The district court then analyzed the facts under the Idaho Supreme Court's holding in *Arregui*, as cited above. Specifically, the district court found that the affidavits did not indicate that the familiarizing nurses possessed sufficient knowledge of the local standard of care applicable to the defendants in the same time frame as the alleged malpractice. R. Vol. III, p. 10. As a result, the district court held: "Simply being a nurse is not sufficient, there must be a connection to skilled nursing facility care, in Lewiston, Idaho in October 2008. Without this information, the Defendants' motion to strike is granted." R. Vol. III, p. 10.

The foregoing shows that the district court acted within the bounds of discretion and applied the correct legal standards. *See O 'Conner v.* ***23** *Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008). In addition, the district court reached its decision through an exercise of reason. *Id.*

A review of the Second Affidavit of Nurse Wendy Thomason shows it does not set forth the applicable standard of health care practice for nurses, or specific facts as to how such knowledge was obtained. Furthermore, the affidavits likewise fail to set forth specific facts supporting that the familiarizing experts had actual knowledge of the applicable standard of health care practice for long-term skilled nursing care facilities in Lewiston, Idaho, in October of 2008.

In her affidavit, Nurse Thomason provided four practitioners upon whom she allegedly consulted to obtain actual knowledge of the applicable standard of health care practice: Dr. Jane Fore, Nurse Debbie Lemon, Nurse Kelli Stellmon, and Dr. Jayme Mackay. Of the four professionals identified in Nurse Thomason's affidavit, only Drs. Fore and Mackay were identified as allegedly having knowledge of the applicable standard of health care practice for nursing homes. R. Vol. III, pp. 495-96. Even then, Ms. Thomason's affidavit did not lay adequate foundation for either of these purported experts. This is particularly true as no additional inference is to be given to this evidence.

i. Dr. Jane Fore

Ms. Thomason identifies Dr. Jane Fore, in her affidavit as a wound care physician with whom she allegedly discussed the case. The entire basis for Dr. Fore's knowledge of the applicable standard of health care practice was that "she has worked with nurses in the region's ***24** nursing homes for several years." R. Vol. III p. 495. The rule requires that the consulting expert have actual knowledge of the applicable standard of health care practice for a long-term care facility in Lewiston during October of 2008. A conclusory statement that one has knowledge of such standards, however, does not meet the foundational requirements. The affidavit failed to set forth specific facts showing how working with regional nurses in nursing homes familiarized Dr. Fore with the applicable standard of care.

ii. Dr. Jayme Mackay

Dr. Mackay's purported knowledge of the applicable standard of care likewise fails. There are no specific facts in Ms. Thomason's affidavit supporting Dr. Mackay's actual knowledge of the applicable standard of health care. It should also be noted that, as discussed below, Dr. Mackay's own affidavit did not allege any facts supporting his actual knowledge of the applicable standard of health care practice for nurses, what that standard was, and what specific standards were allegedly violated. Similar to statements in the affidavits held inadmissible in *Dulaney and Arregui*, conclusory statements that Dr. Mackay was familiar with the applicable standard of health care practice for nurses were insufficient to lay foundation for his actual knowledge.

iii. Nurse Debbie Lemon

The affidavit, as it pertains to Nurse Lemon, also provided insufficient information as to the actual knowledge of the local standard of health care practice. The affidavit did not state that ***25** Nurse Lemon had actual knowledge of the applicable standard of care, nor that Nurse Lemon communicated such standard to Nurse Thomason. As set forth in Dulaney and Arregui, being a member of the same profession is insufficient. The affidavit was required to set forth specific facts supporting her knowledge of the applicable standard of care. While Nurse Lemon certainly sets forth numerous accomplishments and experience supporting general qualifications and expertise in nursing, the affidavit fails to show how being an associate professor at Lewis and Clark in Lewiston in 2008 gave her actual knowledge of the applicable standard of care for this class of health care provider. R. Vol. III, pp. 495, 515-24 (incorporating the Curriculum Vitae for Nurse Debbie Lemon). At the same time, Nurse Lemon also acted as a consultant for an adult home in the State of Washington. Similar to the professor expert in Dulaney, Nurse Thomason alleged no specific facts that as a professor, she remained in contact with any former student working as a nurse in a long-term care facility, or taught the applicable standard of care for Lewiston in October of 2008. She did not testify that she practiced nursing in a skilled nursing facility in Lewiston, in October of 2008. There are no facts stating that the standard of health care practice in a Washington adult care facility was the same as nurses practicing in a long-term care facility such as Life Care in Lewiston, in October of 2008. There were insufficient facts on which the district court could determine that Nurse

Lemon had an actual knowledge and expertise to familiarize Ms. Thomason with the applicable standard of heath care practice. Further, under the appropriate standards, no additional inferences were given by the district court.

***26 iv. Nurse Kelli Stellmon**

Nurse Stellmon also did not meet the foundational requirements to be used as a familiarizing source. Ms. Thomason's affidavit stated that Nurse Stellmon worked at a wound healing center with **elderly** patients. R. Vol. III, p. 496. She did not work at a long-term care skilled nursing facility at the relevant time. The only fact in Ms. Thomason's affidavit supporting her knowledge of the applicable standard of health care practice was that Nurse Stellmon conducted a survey of other, anonymous nurses working in nursing homes in the Lewiston area to determine the standard of health care practice in 2008. The affidavit does not provide specific facts such as who these nurses were, when they worked in a long-term skilled nursing care facility, and what the standards or procedures were. The district court acted within its discretion in finding a lack of proper foundation.

v. Other Sources

In addition, Ms. Thomason's affidavit is insufficient under Idaho Code §6-1013 to lay adequate foundation for her own expert opinion. Ms. Thomason testified that in addition to consulting local professionals, none of which were qualified as shown supra, she acquired knowledge of the applicable standard of care by:

> Reviewing the affidavit of Carol McIver, and reviewing additional information available regarding Life Care Center of Lewiston including, but not limited to, National Awards received; ratings and reviews from CMS, and other organizations; and a history of substantiated complaints.

***27** R. Vol. III, p. 495. After reviewing the above information, she opines that:

> In general, I would opine that the standard of care for skilled nursing facilities in the Lewiston region during this time period was (as it generally remains), very similar to the standard of care for skilled nursing facilities nationwide.

R. Vol. III, p. 496. Ms. Thomason does not indicate which specific facts led her to conclude that the local standard of health care practice for a long-term skilled nursing care facility, caring for patients like the Decedent, was the same as, or had been replaced by, a national standard. The local professionals did not adequately lay foundation for their actual knowledge of the local standard of care, let alone equate it with a national standard, for long-term care facilities in Lewiston in 2008.

Her reliance on Ms. McIver's affidavit was equally misplaced. Ms. McIver did not, nor was she required to, set forth the local standard of care for long-term facilities in Lewiston in October of 2008. Furthermore, Ms. McIver testified that Life Care met the applicable standard of health care practice. Ms. Thomason also fails to set forth any facts showing that any local standard of health care could be learned by reviewing National Awards, ratings from CMS and other organizations (none of which are indicated to be local), or individual complaints filed against the facility.

vi. Federal and State Regulations

This Court has not held that an out-of-area expert can acquire knowledge of the applicable local standard of care solely by studying federal or state regulations or laws and equating them with the local standard. In every case, the out-of-area expert has consulted a local ***28** specialist with actual knowledge of the applicable standard of health care practice, or at least reviewed depositions equating the local standard with a national or state standard. *Grover*, 137 Idaho at 251-252, 46 P.3d 1109-10 (foundation can be shown familiarity with Idaho licensing requirements and consulting three local specialist); *Hayward*, 141

Idaho at 628-29, 115 P.3d 713, 719-20 (local expert testified to national standard in administering pharmaceuticals in nursing home).

Nurse Thomason's affidavit does not set forth specific facts that any of the consulted professionals indicated that the local standards of health care practice for a long-term skilled nursing care facility in 2008 were replaced by national or statewide standards. Furthermore, Ms. Thomason does not testify that the local standard of health care practice was the same as a national standard. Rather, Ms. Thomason states that in general, the standards are "very similar." R. Vol. Ill, p. 496. She does not specify which, if any, aspects of a long-term facility are governed by a local standard of health care practice, and to what extent the applicable standards had been replaced by national standards or regulations for licensure. Finally, unlike the cited regulations related to the physical administration of pharmaceuticals in *Hayward*, Nurse Thomason cites no federal regulation setting a clear standard of conduct required to maintain a facility license. As a result, the district court acted within its discretion in striking Ms. Thomason's affidavits.

***29 E. The District Court Acted within its Discretion in Determining the Affidavits of Dr. Jayme Mackay were Inadmissible.**

The district court properly acted within its discretion in determining that the affidavits of Dr. Mackay were inadmissible regarding the applicable standard of health care practice. The district court found that Dr. Mackay's affidavits provided no information regarding his knowledge of the local standard of care for nurses in a skilled nursing facility in Lewiston, Idaho, in October, 2008. R. Vol. III, pp. 10-11. The district court also stated its decision was based upon the same reasoning set forth earlier in its detailed decision. R. Vol. III p. 11. A review of the district court's decision shows it acted within the bounds of discretion and applied the correct legal standards. *See O'Conner*, 145 Idaho at 909, 188 P.3d at 851. In addition, the district court reached its decision through an exercise of reason. *Id.*

A review of the supplemented Affidavit of Jayme Mackay M.D. shows it fails to set forth sufficient facts as to his actual knowledge of the applicable standard of health care practice. His affidavit sets forth facts related to his medical care of Decedent, including his medical orders for her care, and his interactions with the nursing staff at Life Care. R. Vol. III, p. 484. However, noticeably absent from his affidavit are any specific facts setting forth his actual knowledge of local standard of health care practice for nurses in a long-term skilled nursing care facility in Lewiston in October of 2008. He cites numerous interactions with Life Care specific to the Decendent's medical care, but he does not indicate how these interactions gave him knowledge of the applicable standard of health care practice for a nurse practicing in a long-term care facility. *Id.* Further, Dr. Mackay never states what the applicable standard of care entails. ***30** Nonetheless, Dr. Mackay concludes in his opinion that "failure to use those cautions was a breach of the standard of care that was owed by Life Care..." that ultimately resulted in her death. *Id.* Unlike the physician expert in *Newberry* who testified specifically how he obtained familiarity with the applicable standards of health care for a physician in a different field based on his interactions, Dr. Mackay set for no specific facts for his alleged knowledge of Life Care's standard of care and how it was breached. This is precisely the type of conclusory affidavit prohibited by *Dulaney and Arregui.* The district court did not **abuse** its discretion in striking Dr. Mckay's affidavits.

F. The District Court's Order Denying Summary Judgment to Mattox is Not an Appealable Order.

Mattox challenges the district court's denial of his request for summary judgment. Idaho has consistently held that a denial of summary judgment is not an appealable order. *Hunter v. Dep't of Corr.*, 138 Idaho 44, 46, 57 P.3d 755, 757 (2002)(An order denying a motion for summary judgment is not an appealable order itself, nor is it reviewable on appeal from a final judgment); *Chandler v. Hayden*, 147 Idaho 765, 772-73, 215 P.3d 485, 492-93 (2009)(It is well settled in Idaho that an order denying a motion for summary judgment is an interlocutory order from which no direct appeal may be taken). [3]

***31** Mattox misapplies the relevant burdens of proof associated with a motion for summary judgment. As discussed *supra*, Life Care met its burden in establishing, through admissible evidence, the absence of any genuine issue of material fact, thereby

shifting the burden of proof to Mattox to show a genuine issue of fact existed. Assuming *arguendo,* that Life Care had not met this burden, the district court properly refused to consider Mattox's request for summary judgment. Most notably, the record shows that Mattox failed to file his own motion for summary judgment. Accordingly, the district court properly denied summary judgment for Mattox.

G. Attorney Fees on Appeal are Appropriate in this Case because this Appeal was Brought without Foundation.

A party prevailing on an appeal in a civil action may request this Court to grant an award of attorney fees and costs. *See* I.C. § 12-121 and I.A.R. 40 and 41(a). An award of attorney fees on appeal under I.C. § 12-121 is appropriate when this Court has the abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation. *New Phase Investments, LLC v. Jarvis,* 153 Idaho 207, 212, 280 P.3d 710, 715 (2012). It is believed that this case was appealed without adequate foundation.

As discussed above, the case law on the requirements to qualify an expert to testify about the local standard of care for a particular class of health care provider for the relevant time is well established. Idaho Code §§ 6-1012 and 1013 and Idaho case law clearly set out the requirements for laying the foundation for expert opinion testimony. Furthermore, in the underlying action, Life Care originally moved for summary judgment and the district court allowed an additional five months during which Mattox could have qualified the expert ***32** testimony. The appeal from this district court's order is without foundation given the record, and attorney fees and costs are appropriate in this case.

Accordingly, this Court should award attorney fees and costs on appeal.

IV. CONCLUSION

As demonstrated above, the district court acted within its discretion in striking the affidavits of Wendy C. Thomason and Jayme Mackay, M.D., and therefore Life Care's motions to strike and for summary judgment were appropriately granted. Life Care respectfully requests that the order of the district court be AFFIRMED. Furthermore, Life Care requests attorney fees and costs in responding to this appeal.

Footnotes

1 Life Care additionally argued that both affidavits should be stricken as they contained new opinions which were not timely disclosed. As the district court made its ruling on foundation alone, this argument was not addressed in the district court's opinion.

2 It should be noted that Mattox failed to file any motion to strike or otherwise preclude evidence submitted by Life Care in the proceedings before the district court.

3 Life Care acknowledges that this Court has granted permissive appeals from the denial of summary judgment where the district court's decision involves a controlling question of law on which there is substantial grounds for difference of opinion, and an appeal may materially advance the orderly resolution of the litigation. *Idaho Dep't of Labor v. Sunset Marts, Inc.,* 140 Idaho 207, 210,91 P.3d 1111, 1114 (2004); *see also Miller v. Idaho State Patrol,* 150 Idaho 856, 863, 252 P.3d 1274, 1281 (2011) (Because a permissive appeal under I.A.R. 12 from a denial of a motion for summary judgment leads to such an unusual procedural posture, this Court must "rule narrowly and address only the precise question that was framed by the motion and answered by the trial court.").